INTRODUCTION

Ever since 1994, when the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (hereinafter "PNDT Act") was enacted, the academia, social action groups and the citizenry have made plenty observations, comments, criticisms and appraisals. The discourse has largely remained legislation centric, somewhat premising itself on the sufficiency of law to tackle the issue. This is reflected by multitudes of amends and edits suggested by all stakeholders, demanding legislative action for dealing with the problem. In the process of legally analyzing the issue, diverse and variegated approaches and opinions very often converge on one point: poor enforcement. Broadly speaking, there is perhaps no disagreement on the highly unsatisfactory enforcement of the law on female foeticide. Yet again, more often than not, our solutions lie in the realm of the law, needless to say, limited to and dependent upon our poor enforcement mechanism. This paper delves into the problem from a legal standpoint, paradoxically, recommending a non-legal approach. The approach is legal in the sense that it evaluates the law on female foeticide and in many ways, is its critique. But importantly, the paper recommends a paradigm shift in the way we characterize the problem. The author seeks to bring the inherent limitations of the law as a social tool to the forefront and warns against a completely legal approach bereft of active social interventions. The paper concludes by arguing for proactive social intervention schemes and bringing legislative action in tune with this approach.

Part I characterizes the issue of female foeticide focusing on its intersection with social, political and economic factors embedded in our society. Part II briefly describes the current legal framework prohibiting sex selective abortions. Part III appraises the effectiveness of the law in dealing with this social problem. The conclusion of the paper is contained in Part IV.

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THE DEEP ENTRENCHMENT OF FEMALE FOETICIDE IN THE INDIAN SOCIETY

Abortion rights go hand in hand with feminism and women's rights. In India, however, abortion has become an unlikely but fierce agent of patriarchy and oppression against women. Most of the northern states of India fare poorly in child sex ratio\(^2\) and one of its principal causes is sex selective abortion.

This is hardly surprising since the dominant culture favors having male children to female children. Son Preference is often related to traditional Indian culture. Social scientists documenting sex-selective abortion trends in various Indian states report deeply ingrained prejudice against girls.\(^3\) The Atharvaveda says, “The birth of a daughter, grant it elsewhere, here grant a son”.\(^4\) In India, tradition, values and customs encrusted over time have resulted in the insatiable desire for sons, with families having totally marginalized the joy and pleasure in giving birth to a baby girl.

News reports are replete with instances that manifest the Indian perception of daughters as an economic and financial burden.\(^5\) Another commonly acknowledged reason for female foeticide is the financial burden of the wedding of a daughter. The situation is exacerbated by the tradition of dowry.\(^6\)

Despite recent developments, daughters traditionally are not seen as bread winners and often do not contribute economically, even when able and willing. Sons, to the contrary are seen as symbols of economic and social security. Sons are also viewed as a support in old age by parents since the daughters leave their paternal home after marriage.

The deep entrenchment of patriarchy and the bias against women is also reflected in the way property is traditionally inherited, wherein women inheriting the family property is frowned at and is looked down upon.

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\(^3\) Mallika Kaur Sarkaria, 97 Calif. L. Rev. 905, June 2009.


\(^5\) In some cases, the perceived "burden" of having daughters drives parents to take extremely troubling steps, such as suicide and even murder. See, e.g., Mother Kills 2 Girls, Ends Life, H.T. Chandigarh Live, May 3, 2007 (depression from having three girls believed to be the reason behind this 32-year-old mother's actions).

Instances of families committing suicide on being unable to repay debts taken to marry off daughters have blotted Indian newspapers. The Indian social demographics are also marked with low female literacy rates, which further worsens off the situation. Interestingly, not only social and economic milieu but also the governmental policies have added to the woes of women in India. The problem of female foeticide has also been aggravated by the government's continuous appeal for family planning and adopting population-control campaigns.

The classic "Hum Do, Humare Do" (We are Two, and We will have Two) have instilled the idea of the benefits of a small family deep in the minds of the Indian citizenry. This is now being taken to another level with messages like "Have fun with One, Control Population," highlighted on the website for the Department of Family Welfare. Howsoever good intentioned the policy may be, it has certainly backfired as far as the issue of female foeticide is concerned. Having only 2 children means that the couple now has only two chances of having a son, heightening the importance of pre-natal sex determining techniques. It has been found in a study that women whose first child is a girl display higher son preference than women who have had one boy.

These social, economic and political pressures leave an indelible imprint on the Indian mind, shaping their perspectives and outlooks in a rather misogynistic fashion. This is bound to leave one wondering as to the effectiveness of a completely legal approach towards the problem.

LEGAL FRAMEWORK PREVENTING SEX SELECTIVE ABORTIONS

Before analyzing the efficacy of the law in preventing female foeticide, it is imperative that one delves in the legal framework regarding the same.

8 Department of Family Welfare Website, Government of India, Available at http://mohf.wic.in/dofw/website/national%20population%20policy/npp.htm (last visited Apr. 15, 2008)
Medical Termination of Pregnancy Act allows women to abort the foetus when it is younger than 20 weeks. However, the pregnancy can be terminated only in specified conditions which is "(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped."\(^\text{10}\)

Previously, the law on abortion in India was provided in the Indian Penal Code, 1860. The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection), 1994 was targeted at prevention of sex selection.

“The Act requires that all genetic counseling centers register with the government and that ‘no center be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3).’ Clause two lists five "abnormalities" and leaves it to the discretion of the ‘Central Supervisory Board,’ which is described in detail below, to further add other genetic conditions to this list. Clause three requires that a woman who is to be tested for genetic disorders be over the age of thirty-five, have had two or more miscarriages, have been exposed to radiation or drugs, or have a family history of mental retardation or physical deformities."\(^\text{11}\)

“Section 5 (2) of the Act, prohibits any person conducting pre-natal diagnostic procedures from communicating to the pregnant woman or her relative, the sex of the foetus by means of words, signs or in any other manner. Section 6(b) prohibits the determination of the sex of the foetus and Section 20(3) which empowers the appropriate authority (for e.g. the Chief Medical Officer) to suspend in public interest the registration of the clinic or laboratory without issuing any show-cause notice.”\(^\text{12}\)

\(^{10}\) Medical Termination of Pregnancy Act, No. 34 of 1971, India Code (1971), available at http://mohfw.nic.in/MTP%20Act%201971.htm

\(^{11}\) Supra note 2 at page 7.

Also, the Act prohibits advertisements that seek to promote sex determination. In 2003, the Act was amended to cover new and more sophisticated techniques in its sweep.

LIMITATIONS OF THE LAW

Even after the enactment of the law criminalizing sex selection, female foeticide remains to be the bitter truth. People across the globe have expressed their bewilderment at the sheer lack of enforcement of these laws. “Enduring loyalties to Anglo-Saxon adversary jurisdiction, colonial structure of bar, bench and police, shocking instances of administrative deviances and growing decline in political morality have remained the pervasive feature of the Indian public life.”\(^\text{13}\) In such circumstances, trust in the law is fast dissipating.

“When we employ law as a means of social transformation and social empowerment we somehow tend to think of law as autonomous and self-sufficient force upon which the rest of the social order depends. We rely heavily on formal structures of law composed of the documents i.e. constitution, statutes, and precedents, the apparatuses i.e. legislatures, courts, executive departments and the personnel i.e. judges, lawyers, administrators, policemen. We begin to believe that a legislative enactment or a judicial decision aimed at social transformation would automatically be translated into corresponding social actualities. This is, however, a mere delusion.”\(^\text{14}\)

The inherent limitations of the law were profoundly adumbrated upon in the works of Roscoe Pound. This will be discussed in the first half of this part.

The foremost limitation, as put forth by Pound, is that redress of grievance through legal proceeding is limited by 'the necessity of appealing to individuals to set law in motion'\(^\text{15}\) though in India, the rule of locus standi has been substantially diluted, the poor and indigent yet remain largely unrepresented.

\(^{13}\) Parmanand Singh, 3 Jindal Global L. Rev. 39.

\(^{14}\) Id.

\(^{15}\) ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 54 (1942).
The second set of limits is in the difficulty of ascertaining the facts at issue. The difficulty arises due to high stress laid on formal rules of procedure and adherence to strict rules of evidence.

But most importantly, the third limitation of the law in the opinion of Pound is its sheer inability to inculcate moral righteousness. According to Pound, “Law would be helpless to impose many traits of character, and modes of conduct which are morally desirable and socially useful. For character building we have to rely upon other institutions and agencies like family, religion, education and, professional and economic organizations to instill in men and women the habits and attitudes, the modes of behavior and mutual respect and cooperation. It is beyond law and legal apparatus to inculcate morality and instill the habit of conformity and obedience in men and women and to make them accomplished social persons.”

We must thus, despite our hesitations, acknowledge that the law is yet to reach the people who it seeks to govern. “Therefore, unless more intimate institutions are strengthened to prepare people to be law abiding citizens with a sense of responsibility to social values, law can never be an effective instrument of social change.”

This is all the more true in the case of female foeticide, which, as discussed in the previous sections, is deeply entrenched in our society and its culture and tradition. It thus becomes clear that the law alone cannot be used to realize our societal goals and ambitions.

Furthermore, it is argued that the law is, in fact, worsening the problem than solving it. The criminalization of sex selective abortions and the threat of punishment can actually lead to pushing the women further away from receiving healthcare and sanitary facilities, which puts the life of the women and children at great risk.

Moreover, the threat of criminal action under the PNDT Act and the government’s focus being pre-natal sex selective abortions may actually encourage women to shun hospitals and deliver babies at home, and to kill baby girls on birth. It is to be noted that the efforts to curb female foeticide may on the other hand also lead to the resurfacing of the problem of infanticide.

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16 Supra note 12.
17 Supra note 12.
The most powerful criticism of the law on female foeticide is its practical unenforceability. Many argue that though the law regulates prenatal diagnostic procedures, it does not ban these procedures altogether making implementation of the Act practically impossible.\textsuperscript{18}

CONCLUSION

The paper exposes nothing that is not apparent to the eye. In order to combat female foeticide, we have to reinvent our way of viewing the problem. To look at the issue in isolation and to treat it in isolation does not lead us to a pragmatic and workable solution. Our overestimation of the power of the law has only been met with unnoticeable changes in our social realities and statistical proof of our failure to curb the menace.

We require a holistic viewing of this problem. We must recognize that this issue is the product of patriarchal construction of the majority of India, which is “structured around men as heads of households, in economically, culturally, and socially superior positions to women.”\textsuperscript{19} It may be reiterated that unlike dowry or child marriage, abortion by itself is not a means of misogyny. It is the male-centric milieu that has led it to be one of the greatest threats to India’s daughters. It thus becomes imperative that India locks horns with all forms of patriarchy rather than just focusing on sex selection.

Once freed from the clutches of patriarchy, Indian women will be allowed to choose to have a daughter without having to pay dowry, without worrying about old age support and without the fear of protecting her vulnerable chastity.

When the choice is between abuse and honor; ridicule and prestige; vulnerability and security; women will choose honor, prestige, and security Indian women will have sons.

To change the way our society looks at women is no easy task. But that, it seems, is the only means through which any real change can be effectuated.

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\textsuperscript{18} See Vineet Chander, "It's (Still) a Boy ": Making the Pre-natal Diagnostic Techniques Act an Effective Weapon in India's Struggle to Stamp Out Female Feticide, 36 Geo. Wash. Int'l L. Rev. 453, 463 (2004).

\textsuperscript{19} Supra note 2 at page 2.